

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P.,
and SONTERRA CAPITAL MASTER FUND, LTD.,
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CITIBANK, N.A., CITIGROUP INC., BANK OF
AMERICA CORPORATION, BANK OF AMERICA,
N.A., JPMORGAN CHASE & CO., JPMORGAN CHASE
BANK, N.A., THE ROYAL BANK OF SCOTLAND
PLC, THE ROYAL BANK OF SCOTLAND GROUP
PLC, RBS SECURITIES JAPAN LIMITED, UBS AG,
UBS SECURITIES JAPAN CO. LTD., ING GROEP
N.V., ING BANK N.V., ING CAPITAL MARKETS LLC,
BNP PARIBAS, S.A., BNP PARIBAS NORTH
AMERICA, INC., BNP PARIBAS SECURITIES CORP.,
BNP PARIBAS PRIME BROKERAGE, INC.,
OVERSEA-CHINESE BANKING CORPORATION
LTD., BARCLAYS PLC, BARCLAYS BANK PLC,
BARCLAYS CAPITAL INC., DEUTSCHE BANK AG,
CREDIT AGRICOLE CORPORATE AND
INVESTMENT BANK, CREDIT AGRICOLE S.A.,
CREDIT SUISSE GROUP AG, CREDIT SUISSE AG,
CREDIT SUISSE INTERNATIONAL, STANDARD
CHARTERED BANK, STANDARD CHARTERED PLC,
DBS BANK LTD., DBS GROUP HOLDINGS LTD.,
DBS VICKERS SECURITIES (USA) INC., UNITED
OVERSEAS BANK LIMITED, UOB GLOBAL
CAPITAL, LLC, AUSTRALIA AND NEW ZEALAND
BANKING GROUP, LTD., ANZ SECURITIES, INC.,
THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., THE
HONGKONG AND SHANGHAI BANKING
CORPORATION LIMITED, HSBC BANK USA, N.A.,
HSBC HOLDINGS PLC, HSBC NORTH AMERICA
HOLDINGS INC., HSBC USA INC., MACQUARIE
BANK LTD., MACQUARIE GROUP LTD.,
COMMERZBANK AG, AND JOHN DOES NOS. 1-50,

Defendants.

Docket No.: 1:16-cv-05263-AKH

**DEFENDANTS' JOINT
MEMORANDUM OF LAW
IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
LEAVE TO FILE A SUR-REPLY**

Defendants respectfully submit this memorandum of law in opposition to Plaintiffs' motion (the "Motion") for leave to file a sur-reply in opposition to Defendants' motion to dismiss the Corrected Second Amended Class Action Complaint ("SAC") for lack of subject matter jurisdiction and failure to state a claim. (ECF No. 258.)

Judge Kaplan recently rejected the *same* request in another matter by these *same* Plaintiffs¹ on the *same* issue of standing and capacity to sue. *See* Order dated Nov. 29, 2017, *Dennis v. JPMorgan Chase & Co.*, No. 16-cv-6496 (S.D.N.Y.) (ECF No. 199) (denying motion for a sur-reply). This Court should do the same.

Contrary to Plaintiffs' sole argument in the Motion, Defendants did not raise "new" arguments concerning Plaintiffs' lack of capacity on reply. (Mem. in Supp. of Pls.' Mot. for Leave to File a Sur-Reply (ECF No. 259) ("Mem.") at 1.) The record is clear that Defendants raised the capacity issue in their opening brief, and Plaintiffs responded with entirely new assertions of fact that Plaintiffs *admit* they previously withheld from the Court.

In their initial complaints, Plaintiffs made allegations about themselves in the present tense, suggesting that they were going concerns. (ECF No. 4 ¶¶ 18-19; ECF No. 119 ¶¶ 20-21.) Upon seeing a change in tense in the SAC (to past tense), Defendants investigated and discovered that Plaintiffs had ceased to exist long before their initial complaints were filed. Defendants explained in their opening brief in support of their motion to dismiss the SAC that Plaintiffs (i) affirmatively misrepresented their status in the initial complaints—failing to disclose that they were long-ago dissolved entities that lack capacity to bring this action—and

¹ While Defendants herein refer to "Plaintiffs," it is now clear that the named Plaintiffs do not exist.

(ii) maintained that misrepresentation throughout the briefing, argument and decision on Defendants' first motion to dismiss. (ECF No. 243 at 8-9, 13-16.)

In their opposition, Plaintiffs never explained why they concealed their status from the Court for so long. (ECF No. 249.) Rather, Plaintiffs tried to shift the focus to whether Defendants had an obligation to ferret out the misrepresentations in Plaintiffs' initial complaints and thus waived their capacity arguments. (*Id.* at 50-51.) Plaintiffs also argued that purported assignments of their claims to a third party somehow cure their lack of capacity (*id.* at 44-48), and submitted a declaration purporting to evidence those assignments (ECF No. 250).

In reply, Defendants explained that the purported assignments of claims cannot properly be considered on Defendants' motion because they were not pled in the SAC. (ECF No. 255 at 2.) Defendants also demonstrated that, even if the purported assignments were to be considered, they would not provide Plaintiffs with capacity to sue or otherwise salvage their claims. (*Id.* at 3-14.)

As Plaintiffs admit, the arguments supporting Plaintiffs' request for a sur-reply were "based on the content of the Assignments that *Plaintiffs* submitted" to the Court for the very first time "with their opposition." (Mem. at 1 (emphasis added).) Because Plaintiffs pled no facts about these supposed assignments, Defendants had no opportunity to address them in their opening brief. "Reply papers may properly address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party." *Mohsen v. Morgan Stanley & Co. Inc.*, 2013 WL 5312525, at *3 n.2 (S.D.N.Y. Sept. 23, 2013) (quoting *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 226-27 (2d Cir. 2000)). Plaintiffs, therefore, have no grounds to seek a sur-reply. *See, e.g., Travelers Ins. Co. v. Buffalo Reins. Co.*, 735 F. Supp. 492, 495-96 (S.D.N.Y. 1990), *vacated in part on other grounds*, 739 F. Supp. 209

(S.D.N.Y. 1990) (denying a request for a sur-reply where “defendants’ reply papers addressed issues not raised in its moving papers” because “each point in the reply brief directly responds to an issue raised in [the plaintiff’s] opposition papers”).

Plaintiffs’ procedurally improper arguments regarding the assignments² should not open the door for Plaintiffs to burden the Court with an “endless volley of briefs.” *Kapiti v. Kelly*, 2008 WL 754686, at *1 n.1 (S.D.N.Y. Mar. 12, 2008) (denying request to file a sur-reply when the reply brief “responded directly to the arguments advanced” in the opposition).³ Plaintiffs’ Motion should be denied.

² See *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (“a party is not entitled to amend its complaint through statements made in motion papers”).

³ If the Court were to grant Plaintiffs leave to file a sur-reply, Defendants reserve their right to respond.

Dated: January 3, 2018
New York, New York

Respectfully submitted,

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